U.S. Department of Housing and Urban Development
Washington, D.C. 20410-5000

OFFICE OF GENERAL COUNSEL

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570 Yonkers Avenue
Yonkers, New York 10704

Re: PHA Evictions For Criminal Activity Proscribed by Lease Provision
Mandated by Section 6(l)(6) of the U.S. Housing Act

Dear Mr. Macellaro:

This is in response to your recent request, on behalf of the public housing authority (PHA) in Yonkers, New York, for HUD's confirmation that a PHA may, consistent with Section 6(l)(6) of the United States Housing Act and other applicable law, adopt a lease enforcement policy pursuant to which the PHA routinely terminates the lease and evicts all of the occupants of a public housing unit whenever the lease provision mandated by Section 6(l)(6) is violated.[1] Your question is prompted by arguments raised by tenant advocates who apparently claim that PHAs must justify their decision to evict an entire household – and especially members of the household not shown to be in any way culpable of any criminal activity – upon some policy rationale, or policy "considerations," other than violation of the lease alone.

For the reasons set forth herein, HUD confirms that, as a matter of law, a PHA may evict all members of a household any time the relevant lease provision is violated; accordingly, there is no legal bar to a PHA policy of evicting an entire household every time that the relevant lease provision is violated. At the same time, HUD regulations and HUD officials over the years have made it clear that a PHA has the authority not to evict anyone in a household simply because the lease provision has been violated, and have sometimes informally encouraged or exhorted PHAs to consider options short of household-wide eviction. However, HUD repeatedly has emphasized that such authority not to evict, or not to evict everyone, in no way obligates a PHA to consider any option other than the one that the statute and the lease themselves expressly authorize, *i.e.*, termination of the lease and concomitant eviction of the entire household.

[1] Nothing in this letter should be read to imply that the Yonkers PHA, in fact, maintains such a lease enforcement policy – a matter that your request does not address.

As you know, Section 6(l)(6), 42 U.S.C. 1437d(l)(6), provides that:

> Each public housing agency shall utilize leases which – . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

In *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002), the Supreme Court upheld HUD's reading of this statute as authorizing the termination of a lease (the document executed by the PHA and the "tenant"/head-of-household, which creates the relevant "tenancy") whenever any of the statutorily-specified persons commits any statutorily-specified criminal activity. *Id.* at 1233. The Court concluded that HUD provided a "convincing explanation" for interpreting the statute to authorize termination of leases, and eviction of entire households, whenever the wrongdoer was someone to whom the leaseholder had provided public housing access, whether or not the leaseholder could realistically exercise physical control over such a person at all times or anticipate his or her behavior. *Id.* at 1234.

But, most significant for present purposes, the *Rucker* Court, recognizing that the statute subjected public housing leaseholders to a type of vicarious, "strict liability", held that the imposition of such liability by Congress was fully logical as a matter of policy and of Constitutional due process. The Court specifically noted that "[s]uch 'no-fault' eviction is a common 'incident of tenant responsibility under normal landlord-tenant law and practice'" and that "[s]trict liability maximizes deterrence and eases enforcement difficulties." *Id*. at 1235. Thereafter, the Court, quoting the preamble of HUD's regulations and Congress's statute, went on to say that:

> . . . . there is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." 56 Fed. Reg., at 51567. With drugs leading to "murders, muggings, and other forms of violence against tenants", and to the "deterioration of the physical environment that requires substantial government expenditures," 42 U.S.C. 11901(4) (1994 ed., Supp. V), it was reasonable for Congress to permit no-fault evictions in order to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," 11901(1) (1994 ed.).

Id. Accordingly, any lease termination pursuant to Section 6(l)(6) *per se* advances the aforementioned purposes that underlie the statute and therefore needs no further justification. And specifically in terms of deterrence, the more certain it is that everyone in a household will be evicted as a consequence of a lease violation, the greater the motivation is for every law-

abiding household member to be vigilant and the greater the motivation is for every potential wrongdoer to avoid causing harm to innocent residents by doing wrong.[2]

Some confusion regarding the foregoing principle over the years may be attributable to HUD's efforts to reassure PHAs that do not seek to implement a policy of maximum deterrence that it is also acceptable, under the law, for PHAs not to evict anyone – let alone everyone – in a household every time that a violation of the relevant lease provision occurs. The lease provision in question, like most lease provisions, simply states that violation of the provision is legal "cause for termination of tenancy", *i.e.*, legal justification or authority to terminate a tenancy. And a PHA, like any landlord, may or may not choose, as a matter of discretion, to exercise its legal authority to evict in any given instance in which it has the right to do so.

Notwithstanding this clear "cause" language in the statute, several PHAs, in response to HUD's first proposed regulations implementing what is now Section 6(l)(6) in 1991, expressed concern that HUD's regulations would be interpreted to mandate that all PHAs evict every time that a violation of the relevant lease language occurred. To address those concerns, HUD added a section to the final regulations that made it clear that such an interpretation was not intended:

> *Eviction for criminal activity – (i) PHA discretion to consider circumstances.* In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.

24 C.F.R. 966.4(l)(5) (1993). It is in this context that the *Rucker* Court observes that:

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[2] As many PHAs can attest, lease termination and eviction of an entire household also can be a more effective means of ridding public housing of wrongdoers than merely acquiring the leaseholder's agreement to bar the wrongdoer from the premises, because the latter poses the risk that household members allowed to remain in possession will eventually, either intentionally or unwittingly, give the wrongdoer access to the premises once again. Because PHAs can screen public housing applicants for past criminal behavior, housing a new family from the waiting list can pose less of a risk of future criminal activity than allowing the non-wrongdoing members of the family currently in residence to remain in possession. A uniform policy of householdwide eviction also would be less vulnerable to any allegation that a PHA has engaged in a pattern of uneven enforcement that violates antidiscrimination or other civil rights requirements – requirements that, of course, continue to apply notwithstanding the general, and clear-cut, authority that PHAs possess to terminate, or to forgo termination of, any individual lease as a consequence of any violation of the lease provision in question.

> The statute does not *require* the eviction of any tenant who violated the lease provision. Instead it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," 42 U.S.C. 11901(2) (1994 ed. and Supp. V), "the seriousness of the offending action," 66 Fed. Reg., at 28803, and "the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action," *ibid*.

122 S. Ct. at 1235 (emphasis in original). In the latter two parts of the preceding sentence, the Supreme Court is quoting language from HUD regulations issued in 2001, the preamble to which makes it clear that:

> . . . a court's function under HUD's regulations is to determine whether an eviction meets the requirements of the lease and of Section 6(l)(6) as they have been interpreted in that jurisdiction[3], and not whether a PHA has considered additional social and situational factors that HUD's regulations authorize, but do not require, a PHA to consider in making its decision whether or not to pursue eviction of any family or individual whom, under the lease, the PHA has the legal right to evict (see, for example, 966.4(f)(5)(vii)(B).) See *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999).

66 Fed. Reg. 28782 (2001) (emphasis added). Accordingly, HUD has endeavored by regulation to make it plain to PHAs, and to courts, that, while nothing in Section 6(l)(6) mandates the eviction of any leaseholder, likewise nothing in either Section 6(l)(6) or HUD regulations requires that a PHA consider, prior to initiating an eviction action, anything other than whether the relevant lease provision has, in fact, been violated.

Finally, nothing stated by any past or present HUD official in any way alters the substance of the foregoing statement of HUD regulatory authority. To the extent that the Office of Public and Indian Housing acts to impose legally binding restrictions on PHAs, it does so by regulation, not by letter.[4] Consistent with that practice, in the letter issued by

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[3] Because these regulations were issued well before the Supreme Court's decision in *Rucker*, this preamble language corresponds to the reality, at that time, that a given jurisdiction, like the Ninth Circuit Court of Appeals in *Rucker*, may have interpreted Section 6(l)(6), improperly, to require PHAs to demonstrate particularized fault or other lack of "innocence" on the part of the leaseholder in order to justify lease termination.

[4] HUD has noted the July 2 opinion of the Superior Court of New Jersey, Appellate Division, in *Oakwood Plaza Apartments v. Smith*, 352 N.J. Super. 467, 800 A.2d 265 (2002), in which the court concludes – contrary to the authority cited herein – that, in order to seek lease termination based on the criminal activity of even the leaseholder herself, a Section 8 landlord must demonstrate that it "suitabl[y] weigh[ed] . . . positive and negative factors such as those enumerated in federal regulations and HUD's June 6 letter" and otherwise establish that it did

Assistant Secretary for Public and Indian Housing Michael Liu on June 6 of this year,[5] Mr. Liu and Secretary Martinez "urge"[6] PHAs, in making eviction decisions, to take into account the types of factors that HUD regulations authorize them to consider, while taking pains, at the same time, to make it clear that nothing in the letter or elsewhere requires PHAs to consider anything other than the lease violation itself in connection with eviction decisions. In the latter regard, the letter observes in relevant part that:

> after *Rucker*, PHAs remain **free, as they deem appropriate**, to consider a wide range of factors in deciding whether, and whom, to evict as a consequence of such a lease violation. . . .
>
> Like Congress and the Supreme Court, HUD recognizes that **PHAs** are in the best position to determine what **lease enforcement policy** will most appropriately serve the statutory interest of protecting the welfare of the entire tenant population. I know that you will continue to act in a manner that protects that general welfare, while giving consideration - **when you deem it appropriate** - to the interests of individuals who share a household with the wrongdoer but were otherwise unconnected with the wrongdoing.

(emphasis added). Therefore, consistent with the statute, HUD regulations, and the *Rucker* decision, the June 6 letter expressly recognizes that PHAs – and PHAs alone – are empowered to determine what lease enforcement policy, and what individual lease enforcement decisions, are most appropriate in their jurisdictions (subject only to the dictates of independent legal requirements that would prohibit, for example, a PHA policy or practice of evicting only families of a particular race or political party affiliation, or evicting families without providing them notice of an eviction action and an opportunity to challenge such an eviction action in court). In conclusion, in response to your request, there is no legal authority for the proposition that a PHA cannot adopt a policy of maximum deterrence pursuant to which every violation of the lease provision required by Section 6(l)(6) results in lease termination and household-wide eviction.

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not "act in an arbitrary or capricious fashion" in choosing to evict. 800 A.2d at 270. This decision is inconsistent with, and contrary to, the rationale of *Rucker*.

[5] *See* http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf.

[6] These urgings are of essentially the same type that were included in a 1990 Senate Report that was heavily relied upon by the Ninth Circuit majority in the *Rucker* case but that was subsequently held by the Supreme Court to be of no legal consequence. *See* 122 S. Ct. at 1234-235, n. 4 ("these passages may plausibly be read as a mere suggestion about how local public housing authorities should exercise the '*wide* discretion to evict tenants connected with drug-related criminal behavior' that the lease provision affords them," citing Judge Sneed's Ninth Circuit dissent, 237 F.3d 1113, 1134).

Sincerely,

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Litigation